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No. 89-333

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

STATE OF CALIFORNIA,

Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION and

ROCK CREEK LIMITED PARTNERSHIP,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE AMERICAN RIVERS, NATIONAL AUDUBON SOCIETY, FRIENDS OF THE EARTH, SIERRA CLUB, AMERICAN WHITEWATER AFFILIATION, FRIENDS OF THE RIVER, ENVIRONMENTAL POLICY INSTITUTE, TROUT UNLIMITED AND SAVE OUR STREAMS IN SUPPORT OF PETITIONER

STEVEN W. WESTON
(Counsel of Record)
WARD L. BENSHOOF
THOMAS J.P. McHENRY
McCLINTOCK, WESTON, BENSHOOF,
ROCHEFORT, RUBALCAVA & MacCUISH
Fifth Floor
444 South Flower Street
Los Angeles, CA 90071
(213) 623-2322

Of Counsel:
JOHN ECHEVERRIA
General Counsel
AMERICAN RIVERS
801 Pennsylvania Ave., S.E.
Suite 303
Washington, D.C. 20003
(202) 547-6900

Attorneys for Amici Curiae

QUESTION PRESENTED

Can the Federal Energy Regulatory Commission in licensing a hydroelectric project preempt state water law regulations designed to protect the fish and wildlife resources in the state's rivers?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTRODUCTION AND STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	9
ARGUMENT	13
I. THE FEDERAL POWER ACT PRESERVES STATE REGULATORY AUTHORITY OVER BYPASS FLOWS AT FERC-LICENSED HYDROELECTRIC PROJECTS	13
II. FERC AND THE STATES SHARE CONCURRENT JURISDICTION OVER BYPASS FLOWS	34
CONCLUSION	50
APPENDIX: DESCRIPTION OF AMICI CURIAE	52

TABLE OF AUTHORITIES

Cases

	Page
California v. United States, 438 U.S. 645 (1978)	10,21,22, 23
California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987)	48,49
California Fed. Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 107 S.Ct. 683 (1987)	14,38,39, 40
City of Fresno v. California, 372 U.S. 627 (1963)	23
Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984)	26,28
Federal Power Comm'n v. Udall, 387 U.S. 428 (1967)	43
First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n, 328 U.S. 152 (1946)	18,20,22, 23
Florida Lime & Avocado Growers v. Paul, 373 U.S. 132 (1963)	40

TABLE OF AUTHORITIES

Cases

	Page
Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958)	23
LaFlamme v. Federal Energy Regulatory Comm'n, 842 F.2d 1063 (9th Cir. 1988)	25
Monongahela v. Marsh, 809 F.2d 41 (D.C. Cir. 1987)	30
National Wildlife Federation v. Federal Energy Regulatory Comm'n, 801 F.2d 1505 (1st Cir. 1982)	25
Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041 (1st Cir. 1982)	30
State of California v. Federal Energy Regulatory Comm'n, 877 F.2d 743 (9th Cir. 1989)	7,25

TABLE OF AUTHORITIES

Administrative Decisions

	Page
In re Guadalupe-Blanco River Authority, 42 FERC ¶ 61,079 (CCH) (January 28, 1988)	6,35
In re Horseshoe Bend Hydroelectric Company, 42 FERC ¶61,072 (CCH) (January 25, 1988)	6

Legislative History

51 Cong. Rec. 13625 (1914)	17
53 Cong. Rec. 740 (1916)	18

TABLE OF AUTHORITIES

Laws and Statutes

	Page
Electric Consumer Protection Act, Pub.L.No. 99-495, 100 Stat. 1243 (1986)	44
16 U.S.C.:	
Section 797(e)	27,45
Section 802	19
Section 803(a)(2)	32
Section 803(j)	45
Section 821	14,37
33 U.S.C.:	
Section 1341	30
Section 1344(a)	29
Section 1370	42
42 U.S.C.:	
Section 6929	43
Section 7416	42
43 U.S.C.:	
Section 372	21
Section 373	21

TABLE OF AUTHORITIES

Miscellaneous

	Page
Arnold, Emerging Possibilities for State Control of Hydroelectric Development, 13 Envtl. L. Rep. 10135 (May 1983)	16
Cumulative Impacts of Hydroelectric Development, 11 Harv. Envtl. L. Rev. 77 (1987)	16
Federal Energy Regulatory Comm'n, Hydroelectric Power Resources of the United States (January 1, 1988)	5
Getches, Water Law (1984) ..	34
Hydroelectric Power, the Federal Power Act and State Water Laws: Is Federal Preemption Water-Over-The-Dam? 17 U.C. Davis L. Rev. 1179 (1984)	16

TABLE OF AUTHORITIES

Page

Miscellaneous

Meyer, Western Water & Wildlife: The New Frontier (1989) 41

Small Hydroelectric Projects and State Water Rights, 18 Pac. L.J. 1225 (1987) 16

Thomas, Leacox and Farman, Federal Incentives for Hydroelectric Power Projects at New Dams: FERC's Concerns, 18 U.C. Davis L. Rev. 287 (1984) 16

Whittaker, Federal Power Act and Hydropower Development: Rediscovering State Regulatory Powers, 10 Harv. Envtl. L. Rev. 135 (1986) 16

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INTRODUCTION AND STATEMENT OF INTEREST

This case is about who decides how much water must be left flowing in rivers which support hydroelectric projects: the federal government, the states, or the two together? Amici submit that the Federal Power Act mandates that the decision must be made concurrently, with the federal government, in effect, establishing a minimum bypass flow as a "floor" and the states free to establish a higher bypass flow to protect their resources.

Amici[1], non-profit conservation

[1]Amici are American Rivers, National Audubon Society, Friends of the Earth, Sierra Club, American Whitewater Affiliation, Friends of the River, Environmental Policy Institute, Trout Unlimited and Save Our Streams. Pursuant to Supreme Court Rule 37.3, the

organizations with a cumulative membership of over one million persons, have a strong interest in the outcome of this case.[2] Amici believe that hydropower is a useful source of electricity and, especially in light of the serious environmental concerns associated with fossil-fuel and nuclear power generation, nonpolluting hydropower has some distinct environmental advantages. At the same time, certain hydroelectric projects can have serious, and in some instances unacceptable, negative effects on the ecological and recreational value of rivers. Hydroelectric projects can

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consent of the parties to the filing of this amicus curiae brief is filed herewith.

[2]See Appendix for description of Amici.

decimate salmon and other anadromous fisheries by blocking upstream and downstream migration, reduce dissolved oxygen below the acceptable level for fish and other species, or increase water temperatures causing deleterious effects on the ecology of the stream. Impoundments associated with some hydroelectric projects convert free-flowing rivers into slack lagoons, and altered flows below a project can cause deterioration of existing riparian environments. When, as in the case of the Rock Creek project, the water is diverted out of the stream and returned a mile or more downstream, the project virtually eliminates the affected stream segment. Amici believe that the control and mitigation of the these adverse environmental consequences demands

strong and effective governmental regulation.

While hydropower is one of the nation's oldest sources of electric power, the pace of hydropower development has significantly accelerated in the last decade. Today, approximately 2000 non-federal hydroelectric projects are operating under Federal Energy Regulatory Commission ("FERC") licenses. Since the late 1970's, however, FERC has received over 7000 applications to study or construct different hydroelectric facilities. Each year since 1980, FERC has licensed approximately 200 projects nationwide, and between 1984 and 1988 the number of operating hydropower

projects increased by almost 50 percent.[3]

State agencies charged with protecting fish and wildlife and managing river resources closely monitor hydropower development and its environmental effects. As evidenced by the decision of the California Water Resources Control Board on the Rock Creek project, the State of California generally seeks to protect its resources against ill-advised hydroelectric development. In other instances, however, states have not aggressively protected their river resources, and have sometimes sought to impose project operating conditions that

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[3]Federal Energy Regulatory Commission, Hydroelectric Power Resources of the United States (January 1, 1988).

are less protective of the environment than those established by FERC.[4]

Amici support the position of the State of California that it can properly set a higher minimum bypass flow for the Rock Creek hydroelectric project than required by the project license issued by FERC. FERC required minimum flows in the one-mile bypass reach of 11 cubic feet per second (cfs) from May through September and 15 cfs from October

[4] In re Horseshoe Bend Hydroelectric Co., 42 FERC ¶ 61,072 (CCH) (January 25, 1988) (rejecting request of Idaho Department of Water Resources to include in license a condition subordinating license's flow requirements to future upstream consumptive uses); In re Guadalupe-Blanco River Authority, 42 FERC ¶ 61,079 (CCH) (January 28, 1988) (rejecting contention of Texas Water Commission that the FERC could not require minimum flows to protect fisheries in excess of flow specified in state water permit).

through April. California's Water Board has set higher bypass flows to protect fish populations in Rock Creek -- 60 cfs from March through June and 30 cfs from July through February. The Court of Appeals for the Ninth Circuit upheld FERC's assertion that it has exclusive authority to set minimum bypass flows. State of California v. FERC, 877 F.2d 743 (9th Cir. 1989). Amici join California and the forty-three other states acting as amicus curiae in challenging the Court of Appeals' decision.

Amici are filing this brief, however, to emphasize that, just as FERC does not have exclusive jurisdiction to set minimum bypass flows, the states do not have exclusive control over water flows

at hydroelectric projects either. As in many areas of our federalist system, and in the field of environmental regulation in particular, both the states and the federal government play a regulatory role. Amici's position, based on the language of the Federal Power Act (FPA) and the traditional allocation of environmental regulatory authority in our federal system, is that the states and FERC have concurrent jurisdiction over water flow decisions and that operators of hydroelectric facilities must comply with the regulatory requirements set by both FERC and the states. Thus, where a state issues a water permit that calls for a lower water flow than that mandated by FERC license, the licensee is required to comply not only with the state water

permit but also with the more stringent requirements of the FERC license.

SUMMARY OF ARGUMENT

The Federal Power Act (FPA) preserves the traditional regulatory authority of the states over their water resources while granting overall responsibility for the licensing of hydroelectric projects to FERC. The Ninth Circuit Court of Appeals' narrow reading of the FPA would exclude state regulatory authority and must be rejected in light of Section 27's clear and straightforward language, its legislative history and this Court's recent interpretation of virtually identical statutory language in California v.

United States, 438 U.S. 645 (1978). The preservation of state authority over non-federal hydroelectric projects licensed by FERC is even more appropriate in this case than in the context of the federally sponsored reclamation projects addressed in California. While the FPA grants FERC "comprehensive" planning authority, the Court of Appeals was wrong to assume, in the face of the plain language of Section 27, that this grant of planning authority also meant that Congress had given FERC comprehensive and exclusive regulatory authority.

The FPA requires hydroelectric project owners to comply with the provisions of state water law in addition to any requirements imposed by FERC. The

bypass flow requirements established by FERC are merely a minimum; a state may set a higher bypass flow if necessary to protect its river resources. The practical effect of this concurrent regulatory scheme is to require hydroelectric licensees to comply with the minimum bypass flows set by FERC and the minimum bypass flows set by the state water agency. Thus both FERC and the states have the opportunity to achieve their regulatory objectives and there is no conflict between the two sets of regulatory requirements because the project operator can comply with both at the same time.

This system of concurrent jurisdiction is consistent with other federal environmental laws which allow states to

impose more stringent environmental requirements than those imposed by the federal government. In Section 27 of the FPA, Congress included an explicit anti-preemption provision, affirming that it did not intend for FERC decision-making to displace state water authority. At the same time, there is no indication in the FPA that Congress contemplated surrendering all water flow decisions to the states.

ARGUMENT

I. THE FEDERAL POWER ACT PRESERVES STATE REGULATORY AUTHORITY OVER BYPASS FLOWS AT FERC-LICENSED HYDROELECTRIC PROJECTS

The Federal Power Act provides, in affirmative and explicit language, that a FERC licensee, in addition to complying with the terms of its FERC license, must comply with the requirements of state water law. Section 27 of the Federal Power Act states:

> Nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for

> municipal or other uses, or any vested right acquired therein. 16 U.S.C. § 821.

This "anti-preemption" provision, see California Fed. Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 107 S.Ct. 683, 697 (1987) (Scalia, concurring), encompasses state regulation of water uses, as well as rights acquired under state water law; the statute states that the Federal Power Act does not interfere with "the laws of the respective States relating to the control, appropriation, use, or distribution of water..., or any vested right acquired therein" (emphasis added). Section 27 preserves a wide range of state water regulations because the statute speaks of state laws relating to the "control, appropriation, use, or distribution of water." Section 27 also encompasses an unlimited range

of water uses, including hydropower, because the statute refers to state regulation of water "used in irrigation or for municipal or other uses." (emphasis added).

The most obvious way to construe the Federal Power Act so as not to "affect" or "interfere" with state water law is to conclude that state water law requirements apply to nonfederal hydroelectric projects. Stated differently, state law is not affected or interfered with as long as it is recognized that a FERC licensee must comply with state law. The plain mandate of Section 27 is fulfilled by requiring the sponsor of the Rock Creek

project to comply with the conditions of its state water permit.[5]

As explained in detail in the Brief of the State of California at Section III, pp. 22-35, the legislative history of the Federal Power Act confirms that Congress did not intend to displace state law. For example, as stated by

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[5]This interpretation is supported by scholarly opinion. Whittaker, Federal Power Act and Hydropower Development: Rediscovering State Regulatory Powers, 10 Harv. Envtl. L. Rev. 135 (1986); Cumulative Impacts of Hydroelectric Development, 11 Harv. Envtl. L. Rev. 77 (1987); Small Hydroelectric Projects and State Water Rights, 18 Pac. L.J. 1225 (1987); Arnold, Emerging Possibilities for State Control of Hydroelectric Development, 13 Envtl. L. Rep. 10135 (May 1983); Thomas, Leacox and Farman, Federal Incentives for Hydroelectric Power Projects at New Dams: FERC's Concerns, 18 U.C. Davis L. Rev. 287 (1984); Comment, Hydroelectric Power, the Federal Power Act and State Water Laws: Is Federal Preemption Water-Over-The-Dam? 17 U.C. Davis L. Rev. 1179 (1984).

Congressman Ferris in 1914 in introducing H.R. 16673: "Section 14 [now section 27] is a section disclaiming any intention on the part of the Federal Government to interfere with vested rights or the State laws with reference to water rights or the appropriate distribution of water used for irrigation or municipal purposes." 51 Cong. Rec. 13625 (1914) (statement of Rep. Ferris). At this as well as many other points during the deliberations on the Act, Congress made plain its intention to preserve state regulatory authority over water.

In addition, the legislators clearly and repeatedly stated that the Federal Water Power Act was intended to be consistent with the tradition of federal

deference to state water laws followed in the Federal Mining Act of 1988 and Reclamation Act of 1908. See, e.g., 53 Cong. Rec. 740 (1916) (statement of Rep. Taylor).

In reaching the conclusion that the Water Board's minimum flow requirements were preempted, the Court of Appeals principally relied on the Court's decision in First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n, 328 U.S. 152 (1946). In First Iowa, the Court overturned a decision by the Federal Power Commission (predecessor to FERC) denying a license for a hydroelectric project on the ground that the developer had not received a use permit under Iowa law. The only issue squarely presented in First Iowa was

whether the Commission had properly rejected the license application under section 9(b) of the FPA, which requires hydroelectric developers to present "[s]atisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act." 16 U.S.C. § 802. The Court held that section 9(b) only requires a showing of an effort to comply with that law, not actual compliance, and

therefore the Commission had improperly denied the license.[6] The First Iowa Court also commented in dictum that section 27 does not preempt state laws "relating to property rights as to the use of water" and that it "has primary, if not exclusive reference to such proprietary rights." 328 U.S. at 175-76. In ruling that the State of California lacked authority to require higher minimum bypass flows than those required in the FERC license, the Court of Appeals adopted the view that Section 27 was applicable only to "proprietary rights." 877 F.2d at 749.

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[6]The holding of the First Iowa Court on the proper interpretation of Section 9(b) has not been challenged in this case. Amici note that if the Court rejects the expansive federal preemption analysis followed in First Iowa, it may be appropriate to revisit the proper interpretation of Section 9(b).

In California v. United States, 438 U.S. 645 (1978), the Court effectively rejected the conclusions and reasoning of First Iowa. The Court held in California that section 8 of the Reclamation Act generally requires federal agencies when constructing and operating federal reclamation projects to comply with terms and conditions attached to state water permits. Section 8 provides, in language essentially identical to that of section 27 of the FPA, that federal reclamation projects are subject to state laws relating to "control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." 43 U.S.C. §§ 372, 373.

Significantly, the First Iowa Court expressly noted that section 27 was modeled after the language of section 8 and should be interpreted in the same fashion. 328 U.S. at 176 n.20.

Not only did this Court in California reach an entirely different conclusion than the First Iowa Court about the meaning of the statutory language, the California Court expressly rejected the proprietary rights theory that was the premise for the dictum in First Iowa that section 27 was not intended to preserve state regulatory authority over hydroelectric projects. 438 U.S. at 674-75. Further, this Court in California specifically disavowed two decisions that expressly relied on the proprietary rights theory that Section

27 is limited to "takings" of water rights -- Ivanhoe Irrigation District v. McCracken, 357 U.S. 275, 291-92 (1958) and City of Fresno v. California, 372 U.S. 627, 629-30 (1963). 438 U.S. at 674-675. The rejection of the proprietary rights theory in California thus effectively overrules the dictum of the Court in First Iowa.

The Court of Appeals offered several unconvincing reasons for its refusal to follow this Court's teachings in California. First, it erroneously suggested that this Court's interpretation of section 8 in California did not effectively overrule this Court's interpretation of section 27 in First Iowa because the two sections "address two different and

entirely separate water use systems." 877 F.2d at 749. This statement is incorrect because both the FPA and the Reclamation Act address federal programs governing water development projects. Bureau of Reclamation projects have the same, if not greater, potential for interfering with the objectives of state water regulatory laws as do non-federal hydropower projects licensed by FERC. No difference between the Bureau of Reclamation's water development program and FERC's licensing program justifies a different interpretation of the same statutory language applicable to each agency. Indeed, if anything, a stronger case can be made for federal preemption of state water laws applicable to Bureau projects built and operated by the federal government than non-federal

hydropower projects which are subject only to federal licensing.

The second defect in the Court of Appeals' decision is its reliance on the "comprehensive hydropower planning authority" vested in FERC as support for the conclusion that the FPA preempts inconsistent state regulation. 877 F.2d at 748. Amici do not dispute that Congress has directed FERC to ensure that its licensing decisions with respect to individual projects are consistent with comprehensive, basin-wide plans designed to achieve an appropriate balance between competing public uses of rivers. See LaFlamme v. FERC, 842 F.2d 1063 (9th Cir. 1988); National Wildlife Federation v. FERC, 801 F.2d 1505 (9th Cir. 1986). It

hardly follows, however, from this grant of comprehensive planning responsibility that Congress intended to vest exclusive regulatory authority over hydroelectric projects in FERC alone. It is not at all contradictory for Congress to direct FERC to take the lead in preparing plans for hydropower development and at the same time preserve a sphere for state regulation of hydroelectric projects.

This Court, in Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984), already has rejected the contention that Congress' grant of comprehensive planning responsibility must mean that Congress intended to grant FERC exclusive regulatory jurisdiction as well. The Escondido decision dealt with section

4(e) of the FPA, which provides that FERC may issue a license on certain federal lands only after it determines that the project "will not interfere or be inconsistent with the purpose for which such [federal] reservation was created or acquired." 16 U.S.C. § 797(e). Section 4(e) also provides that "[the license] shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls [Interior or Agriculture] shall deem necessary for adequate protection and utilization of such reservation." Id. The Court rejected FERC's contention that it had the authority to review project conditions developed by the Departments of Interior or Agriculture and held, based on the plain language of

section 4(e), that FERC must include the Departments' conditions in the license without modification. 466 U.S. at 795.

The petitioners in Escondido explicitly argued, in line with the thinking of the court below, that the Departments' authority to require inclusion of conditions in a FERC license would be inconsistent with FERC's responsibility under section 10(a) to determine that "the project adopted ... will be best adapted to a comprehensive plan." 466 U.S. at 778 n.21. The Court rejected this argument as plainly inconsistent with the scheme of the FPA. Id. For the same reason, the Court in this case should reject the conclusion of the Court of Appeals below that FERC's comprehensive planning

responsibilities preclude the application of mandatory state water law requirements to hydroelectric projects.

Congress also has provided for other federal and state resource agencies to play important roles in regulating hydroelectric development, further undermining the notion that FERC's comprehensive planning responsibility requires that FERC also have exclusive regulatory authority. Under section 404 of the Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1344(a), the United States Army Corps of Engineers is authorized to issue permits for the discharge of dredged or fill material to navigable waters at a specific disposal site. Because the construction of a dam or hydroelectric

facility typically involves the use of dredged or fill material, the Corps generally has concurrent jurisdiction with FERC over this aspect of hydroelectric licensing. See Monongahela v. Marsh, 809 F.2d 41, 51 (D.C. Cir. 1987) (rejecting contention that FERC has exclusive jurisdiction over hydroelectric development).

Similarly, under section 401 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1341, a FERC licensee is required to obtain water quality certification from state officials before constructing a hydroelectric project. In Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041 (1st Cir. 1982), the court affirmed the breadth of state control

over projects requiring federal licensing and emphasized that a state certification can include such limitations as are necessary to assure compliance "with any appropriate requirement of state law." 684 F.2d at 1056. Under the holding in Roosevelt Campobello, if a state legislature or state agency prohibits or sets conditions on a proposed hydroelectric project, and if the state's water quality agency includes those requirements in its section 401 water quality certification, those conditions are binding on FERC and must become part of the FERC license.

Finally, it is telling that, in recent amendments to the FPA, Congress specifically provided for independent

planning by other federal and state agencies to complement FERC's own comprehensive planning activities. Section 10(a) of the FPA, as amended by the Electric Consumers Protection Act of 1986, requires FERC to consider "[t]he extent to which [a proposed] project is consistent with a comprehensive plan ... for improving, developing or conserving a waterway or waterways affected by the project that is prepared by -- (i) an agency established pursuant to Federal law that has authority to prepare such a plan; or (ii) the State in which the facility is or will be located." 16 U.S.C § 803(a)(2)(A) (emphasis added). Congress enacted this new provision in reaction to FERC's traditional refusal to consider state river development and conservation plans in making its

licensing decisions. Since Congress has now explicitly recognized state and federal agency comprehensive planning efforts it is absurd to try to equate FERC's comprehensive planning mandate with a grant of exclusive regulatory jurisdiction.[7]

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[7]While this case arises from the State of California, and is likely to have particular significance for other western states that have similar appropriative water rights laws, it is important to emphasize that the Court's decision will not be limited in its impact to those states. The language of Section 27 refers in broad terms to state laws "relating to the control, appropriation, use or distribution of water;" there is no limitation in the language of the provision as to the type of state water law. Furthermore, while the legislative history reveals a special concern about the overlap between FERC and state jurisdiction in the western United States, there is no hint in the legislative history that any of the states were intended to be excluded. As a result, Section 27 preserves state water regulatory authority in a variety of forms. While nine states follow the so-called appropriative water rights doctrine

II. FERC AND THE STATES SHARE CONCURRENT JURISDICTION OVER BYPASS FLOWS

The most appropriate resolution of the conflicting demands of the states and FERC on water resources is to recognize that the FPA establishes concurrent jurisdiction over bypass flows at hydroelectric projects licensed by FERC. This is not only the proper reading of Section 27 in the context of the language and legislative history of the FPA but also is consistent with the

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adopted in California, 29 states have a riparian water law system and 12 states have hybrid systems. See Getches, Water Law 3-7 (1984). Section 27 encompasses all of these approaches to water regulation.

traditional balance of state and federal control over environmental resources.

While the State of California in this case mandated higher bypass flows than those required by FERC, it is important to recognize that in other cases FERC may decide to mandate higher flows than the states. For example, in In re Guadalupe-Blanco River Authority, 42 FERC ¶ 61,079 (CCH) (January 28, 1988), which involved the construction of the Canyon Dam Hydro Project on the Guadalupe River in Texas, FERC rejected the State of Texas' challenge to FERC's authority to set higher flows than those provided by the state water permit for the project. The FERC license required a continuous minimum flow of 90 cfs during project operation. Id. By

contrast, the state water permit prescribed water releases equal to the natural inflow to the reservoir. Id.

Strictly speaking, of course, this case does not present the issue of FERC's authority to require one of its licensees to provide minimum flows higher than those required by the state. Nonetheless, this Court's decision will necessarily shed important light on this issue. While the forty-three states supporting the position of the Petitioner State of California have not directly addressed this issue, it is clear from their brief in support of California's petition for a writ certiorari that they believe the FPA should be construed to grant the states "exclusive control" over state waters,

and to support "[a] single comprehensive regulatory scheme" governed by the states. Brief of Amici Curiae States of Idaho, et al. in Support of Petitioner at 15, 17. Amici conservation groups disagree with this reading of the FPA. Section 27 is, at most, an "anti-preemption" provision, not a complete surrender of federal authority over water flows.

Section 27 states that the FPA should not be construed "as affecting or intending to affect or in any way to interfere" with state water laws. 16 U.S.C. § 821. Nothing in the language of section 27 suggests that it was intended to grant either the federal government or the states exclusive jurisdiction to establish water flows at

hydroelectric projects. Section 27 does not remove federal authority, it merely preserves state authority. The FPA does not "affect" or "interfere" with state water law as required by Section 27 so long as it is understood that a FERC licensee is subject to concurrent state and federal jurisdiction and must comply with the water flow requirements of FERC and the state.

The conclusion that the FPA allows FERC to establish a minimum bypass flow as a "floor" while leaving the states free to set a higher bypass flow is consistent with recent decisions of this Court dealing with federal preemption. For example, in California Fed. Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 107 S.Ct. 683 (1987), the Court upheld

against a preemption challenge a California statute that required employers to provide unpaid leave for pregnant workers. The Court ruled that the federal Pregnancy Discrimination Act (PDA), which requires that pregnant women be treated the same as other disabled but nonpregnant employees, did not prevent the state from providing greater protection for pregnant workers. Id. The Court expressly adopted the Court of Appeals' conclusion that Congress intended the federal PDA to be "'a floor beneath which pregnancy disability benefits may not drop - not a ceiling above which they may not rise.'" California Fed. Savings & Loan Ass'n v. Guerra, 758 F.2d 390, 396 (9th Cir. 1985). In reaching the conclusion that the PDA's requirements were a floor

for worker benefits, not a ceiling, the Court relied on the two anti-preemption clauses contained in Title VII, of which the PDA was a part, which "severely limit Title VII's pre-emptive effect", 107 S.Ct. at 690, and the legislative history of the PDA indicating that "Congress repeatedly acknowledged the existence of state anti-discrimination laws that prohibit sex discrimination on the basis of pregnancy." The Guerra Court pointed out that employers could comply with both federal and state law and that "[t]his is not a case where "'compliance with both federal and state regulations is a physical impossibility.'" 107 S.Ct. at 695, quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963).

Section 27 is an "anti-preemption" clause of the type that was at issue in Guerra. 107 S.Ct. at 697 (Scalia, J., concurring). The legislative history of the FPA evinces no intent on the part of Congress to supercede state water law. In fact, the legislative history contains numerous comments on the need for the protection of state authority. Thus, as with the Pregnancy Discrimination Act at issue in Guerra, Congress recognized in the FPA that states have legislated and would continue to legislate in this area.[8] And, as in Guerra, it is not a physical impossibility for the operator of the

[8]Sixteen of the nineteen western states have incorporated instream flow protection into their prior appropriation systems. Meyer, Western Water and Wildlife: The New Frontier (1989).

Rock Creek project to comply with both federal and state law.

The notion that federal law provides a floor for resource protection to which states may add higher ceilings appears throughout federal environmental legislation. Under the Clean Air Act, for example, a state may enforce stricter air pollution emission requirements than those required nationwide by the Environmental Protection Agency. 42 U.S.C. § 7416. Similarly, under the Resource Conservation and Recovery Act, a state may set more stringent requirements for solid waste disposal than the federal government. 42 U.S.C. § 6929; see also 33 U.S.C. § 1370 (Clean Water Act).

The conclusion that section 27 preserves concurrent FERC authority over water flows is also supported by a common sense understanding of what is involved in regulating the environmental effects of hydroelectric development. FERC simply cannot carry out its responsibility to prevent and/or mitigate the adverse effects of hydroelectric development on rivers unless it has the authority to mandate specific water flows. In Federal Power Comm'n v. Udall, 387 U.S. 428 (1967), the Court recognized that FERC's duty to examine whether a proposed project will serve the public interest requires "an exploration of all issues relevant to the 'public interest,' including future power demand and supply, alternate sources of power, the public interest in

preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife." 387 U.S. at 450. The resolution of "all issues relevant to the public interest," Id., including instream recreation and fisheries, obviously requires consideration of minimum flows at hydroelectric projects.

The Electric Consumer Protection Act of 1986 (ECPA), Pub.L.No. 99-495, 100 Stat. 1243 (1986), further reinforces FERC's duty to consider instream flows as one aspect of its regulatory responsibilities. For example, section 10(j) of the FPA, as amended by ECPA, directs FERC to include

in project licenses terms and conditions to protect fish and wildlife. 16 U.S.C. 803(j). In practice, the single most common and significant condition developed pursuant to section 10(j) is a minimum flow requirement. Furthermore, section 4(e) of the FPA, as amended by ECPA, directs FERC in deciding whether and on what terms to license a project, to give "equal consideration" to, on the one hand, power generation and, on the other, to "the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality." 16 U.S.C. 797(e). FERC's "equal consideration"

mandate would be eviscerated if FERC could not provide protection for downstream fisheries and recreation by setting appropriate minimum flow requirements.

It would literally be impossible for FERC to regulate the construction and operation of hydroelectric facilities, on the one hand, and for the states to regulate the appropriation and use of water, on the other. The issue of the appropriate quantity of stream flow at a hydroelectric project is critical in the hydroelectric licensing process as well as in the state regulatory process. The unavoidable practical overlap between water regulation and hydroelectric licensing requires some overlap as well in the authority

exercised by FERC and by the state over hydroelectric projects.

The conclusion that FERC and the states exercise concurrent jurisdiction over minimum flows avoids unnecessary conflict between state and federal requirements. In this particular case, for example, FERC required a minimum by-pass flow of 11 and 15 cfs depending on the season, and the California Water Board required a minimum by-pass flow of 30 and 60 cfs. While the minimum flow required by the Water Board is higher than the minimum flow required by FERC, there is no actual conflict because the licensee will comply with both requirements if the licensee meets the state standard. Similarly, if FERC were to set a higher flow requirement than

the state, the licensee could comply with both by meeting the FERC standard.

Finally, concurrent federal and state jurisdiction over water flows at hydroelectric developments is consistent with this Court's recent decision in California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987), concerning the appropriate regulatory balance between state and federal control over natural resources. In Granite Rock this Court approved the state and federal government's shared regulatory authority over federal mineral resources by upholding a permit requirement imposed by the California Coastal Commission on a mining developer operating on federal land. Although the project was located on lands

administered by the United States Forest Service, this Court required the mining developer to obtain an additional permit from the state agency. In reaching its decision, this Court reversed the Ninth Circuit Court of Appeals which had relied on the so-called "First Iowa doctrine" in reaching the conclusion that the Coastal Commission's permit authority intruded on federal authority. Granite Rock Co. v. California Coastal Comm'n, 768 F.2d 1077, 1082-83 (9th Cir. 1985).

The decision of the court below in the case at bar directly conflicts with Granite Rock's teaching that federal agencies must accommodate state environmental regulatory authority. Moreover, under the Granite Rock

decision, FERC's assertion of exclusive jurisdiction amounts to an argument that there is no possible set of conditions that the California State Water Resources Control Board could place on the hydroelectric license that would not conflict with federal law, i.e., a facial challenge to the State Water Board's minimum flow requirement. Granite Rock soundly rejected that approach.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the court below and remand the case for further

proceedings not inconsistent with its opinion.

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Respectfully submitted,

STEVEN W. WESTON
Counsel of Record
WARD L. BENSHOOF
THOMAS J.P. McHENRY
McCLINTOCK, WESTON, BENSHOOF, ROCHEFORT, RUBALCAVA & MacCUISH

JOHN ECHEVERRIA
General Counsel
AMERICAN RIVERS

Attorneys for Amici Curiae: American Rivers, National Audubon Society, Friends of the Earth, Sierra Club, American Whitewater Affiliation, Friends of the River, Environmental Policy Institute, Trout Unlimited and Save Our Streams

APPENDIX

DESCRIPTION OF AMICI CURIAE

American Rivers is a non-profit organization with offices located at 801 Pennsylvania Avenue, S.E., Washington, D.C. The mission of American Rivers is to preserve America's outstanding rivers and their landscapes. With approximately 12,000 members across the country, American Rivers is the nation's principal river conservation organization.

National Audubon Society is one of the oldest, largest, and most experienced national conservation organizations. It has approximately 500,000 members, including approximately 65,000 members in the State of California, who are dedicated to the conservation and wise

use of natural resources and protection of the environment. National Audubon Society is incorporated under the laws of the State of New York and has its corporate headquarters at 950 Third Avenue, New York, New York 10022. High among National Audubon Society's purposes is the conservation of the nation's waters and the protection of riparian and aquatic habitat.

Friends of the Earth is a national and international conservation organization, incorporated in the State of New York, with approximately 15,000 members residing in the fifty United States and the affiliate conservation organizations in thirty-one different countries around the world. Its office is located at 218 D Street, S.E., Washington, D.C. 20003.

Friends of the Earth has a long history of seeking to preserve special free-flowing rivers and streams and promoting ecologically sound hydroelectric development. Its members use and enjoy many of the rivers and streams that are threatened by hydroelectric development.

The Sierra Club is a non-profit corporation organized in 1892 under the laws of the State of California, with its principal place of business in San Francisco, California and other offices located throughout the nation. Its office is located at 730 Polk Street, San Francisco, California 94109. The Sierra Club is a national conservation organization with approximately 420,000 members dedicated to protecting natural resources, including outstanding

riverine resources. Approximately 160,000 of the Club's members reside in the State of California.

American Whitewater Affiliation was established in 1961 to protect and enhance the recreational enjoyment of whitewater sports in America. Its office is located at P.O. Box 375, Denver, North Carolina 28037. The primary focus of the Affiliation's activities has been the preservation, protection and enjoyment of whitewater rivers in America and throughout the world. The Affiliation is a Missouri not-for-profit corporation with approximately 1300 individual or business members and 61 affiliate members.

Friends of the River is a California non-profit organization with 9,000 members. Its office is located at 909 12th Street, Suite 207, Sacramento, California 95814. Its mission is to preserve streams and rivers in their natural state in the western United States. Most of its members use rivers and streams for fishing, boating, walking, aesthetic appreciation and other forms of recreation. Friends of the River is frequently involved in proceedings before the Federal Energy Regulatory Commission and the State of California Water Resources Control Board.

Environmental Policy Institute is a national conservation organization dedicated to the protection of the

environment and the conservation of natural resources. Its office is located at 218 D Street, S.E., Washington, D.C. 20003. It is vitally interested in assuring the maximum protection for America's most outstanding rivers. Environmental Policy Institute has a long-standing interest in promoting sound water development policy, and has assisted state as well as local organizations in river protection efforts.

Trout Unlimited is a national non-profit conservation organization with approximately 64,000 members dedicated to the preservation, enhancement and restoration of the coldwater fisheries of America. It engages in a variety of activities including assisting local,

state and federal agencies in fisheries management. Its offices are located at 501 Church Street, N.E., Vienna, Virginia 22180. A key to maintaining coldwater fisheries' biological integrity is the quantity and quality of the water. Thus, Trout Unlimited works to assure stream flows that support strong trout and salmon populations.

Save Our Streams (SOS) is a grassroots volunteer organization devoted to preservation of free-flowing streams on federal lands in California. Its office is located at P.O. Box 56, North Fork, California 93643. SOS has 750 members who use California streams for hiking, swimming, fishing, and spiritual renewal.